Supreme Court, U.S.
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No. 98-1856

IN THE

Supreme Court of the United States

LEILA JEANNE HILL, AUDREY HIMMELMANN, AND EVERITT W. SIMPSON, JR.

Petitioners,

v.

THE STATE OF COLORADO, BILL OWENS, GOVERNOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Colorado Supreme Court

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Under the Colorado statute challenged herein, it is a crime to approach and hand a person a leaflet on a public sidewalk unless that person first consents.

In their Brief in Opposition ("Opp."), Respondents do not deny that the challenged statute restricts the exercise of fundamental, constitutionally protected rights of speech, press, and assembly. Nor do they deny that the Colorado's Floating Bubble Zone statute operates in traditional public forum properties – sidewalks, streets, and public passages – within which constitutional freedoms of expression are at their high water mark and the power of government to restrain the ordered exercise of such rights is at its lowest ebb. Instead, Respondents only seek to justify the most sweeping abrogation of constitutionally protected expression currently in force in the United States. For the reasons set forth herein, the petition for a writ of certiorari should be granted.

REPLY ARGUMENT

1.a. To justify one of the most sweeping bans of protected expression in public places ever enacted by a state legislature, Colorado asks this Court to consider the legislative history of Colorado's Floating Bubble Zone Statute. *See* Opp. at 1 (citing to legislative history). Examination of that legislative history, however, leads to an obvious conclusion about Colorado's startlingly overbroad restriction on speech: none of Petitioners was identified therein as a wrongdoer whose conduct justified such sweeping interference with cherished constitutional freedoms. Instead, as with the vast majority of Coloradans whose rights have been diminished by the statute, Petitioners are innocents who have been caught up in the tangled web cast by the Colorado General Assembly. Thus, unlike the protesters in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), these Petitioners have, *without cause*, been denied the right to distribute free literature, to display signs to passersby, and to utter any words that a jury might consider to be

"oral protest," "oral counsel," or "oral education."

1.b. Respondents ignore the nature of Petitioners' suit and the text of the statute. Although the Colorado General Assembly included in the same enactment a provision prohibiting obstruction of access to medical facilities, *see* C.R.S. § 18-9-122(2), Pet. App. 65a, Petitioners have not challenged that portion of the statute. It is not contended by Respondents or by the court below that Petitioners seek to carry out physically obstructive blockades of health care facilities.

Respondents contend that "this statute was enacted . . . for the express purpose of safeguarding access to health care clinics" that had been previously prevented by "direct physical blockades," and by protestors "surrounding, crowding, yelling at, grabbing, pushing, shoving, hitting, and spitting on those seeking access . . . ." Opp. at 1. Petitioners have never disputed that such obstructive conduct is subject to legislative regulation. Petitioners challenge C.R.S. § 18-9-122(3), Pet. App. 65a, however, because that statutory section ignores the problems of protesters "surrounding, crowding, yelling at, grabbing, pushing, shoving, hitting, and spitting on those seeking access." Instead, the Colorado's Floating Bubble Zone statute focuses on the "problems" of free literature, sign displays, and public discussion.

1.c. Respondents misstate the operation of the statute and its effect on Petitioners' exercise of fundamental, constitutionally protected rights.

The statute expressly prohibits approaching within eight feet of another person, while within 100 feet of any entrance to a health care facility, for the purpose of passing a leaflet to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person. *See* C.R.S. § 18-9-122(3), Pet. App. 65a. Of that restriction, Respondents assert that it does not abridge Petitioners' free speech and free press rights to communicate with *passersby*. *See* Opp. at 2. But in fact, as Petitioners walk through

the zones created by the statute,[1] they are no longer at liberty simply to hold up a sign for others to see as they pass them by or to hold out their hands with pamphlets or publications for the other person to take if they desire. To do so, without obtaining express consent from a distance of greater than eight feet, is to commit a misdemeanor criminal offense.

Respondents' statement of the case also fails to take into account the nature of Petitioners' expressive activities. *Cf.* Petition at 2-4 (describing those activities). Respondents fail to comprehend that the display of a sign, the offer of a leaflet, and the utterance of oral protest, counsel or education, may each target more than one person at a time. Simpson's principal expressive activity, displaying a "sandwich board" style sign, reaches many groups and individuals simultaneously as Simpson

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1. There is no disputing that the enactment of the statute has interfered with Petitioners' communicative activities. *See* Opp. at 2 n.4; *cf.* Petition at 3-4 (and accompanying footnotes) (discussing impact of statute on Petitioners' expressive activities). Simpson has discontinued entering into the areas affected by the 100 foot zones around entrances to health care facilities. *See* Opp. at 2 n.4. Hill and Himmelmann have had to surrender the rights to free speech and free press that they formerly enjoyed and only are able to proceed into the zones with "great caution and circumspection." *Id.* While within the 100 foot zones, Hill and Himmelmann have encountered great difficulty in complying with the floating bubble zones surrounding the many groups of people that walk together on the sidewalks and public ways and the many individuals present in these locations at one time. *Id.*

In opposition, Respondents state, "[t]he Petitioners have all demonstrated outside health care facilities for a number of years, yet none of them have ever been cited, detained, arrested or referred for prosecution under . . . the statute . . . ." *See* Opp. at 2 n.4. The reason for Petitioners' avoidance of prosecution is obvious. Petitioners have complied with the terms of the statute, despite its injurious impact on their expressive activities, to avoid prosecution while they challenge the statute through this litigation.

approaches them. Hill and Himmelmann's offers of free literature and expression of words of protest, counsel and education are broadcast to more than one auditor or recipient at a time.[2] Where an orator seeks to utter works that constitute protest, counsel, or education, while walking on the public sidewalks, that orator is transformed by the challenged statute into a petty criminal if he fails to obtain consent before coming within eight feet of each and every person to whom he seeks to communicate. In each of these circumstances, communications intended to reach multiple individuals simultaneously are restrained unless and until the consent of each is obtained.

1.d. Respondents assert that certain unidentified arguments of Petitioners "do not appear to have been preserved for review by this Court."[3] *See* Opp. at 3. Respondents' assertion is demonstrably not well-taken.

First, the questions presented in the Petition, *see* Petition at i, have already been shown to be fully preserved for review by this Court. *See* Petition at 4-9.

Second, review of the application for review on certiorari filed below and the ruling thereon by the Colorado Supreme Court confirms that Respondents' blank assertion is wrong. Review of a judgment of the Colorado Court of Appeals is sought from the Colorado Supreme Court by filing a petition for a writ of certiorari. *See* Colorado Appellate Rules ("C.A.R.") 49. The

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2. Even if every effort of communication only targeted one person at a time, the statute's impact on speech would be unconstitutional.

3. Respondents did not make this argument in opposition to the previous petition filed in this Court in this litigation. *See generally* Brief in Opposition to the Petition for Writ of Certiorari, *Hill v. Colorado*, No. 95-1905. Consequently, it would seem, that undeveloped argument refers only to matters subsequent to this Court's prior decision in this matter.

contents of a petition for a writ of certiorari are set by those same rules. Rule 53 obliges petitioners to include in their petitions

> [a]n advisory listing of the issues presented for review expressed in the terms and circumstances of the case but without unnecessary detail. The statement of an issue presented will be deemed to include every subsidiary issue clearly comprised therein. *Only the issues set forth or clearly comprised therein will be considered.*

C.A.R. 53 (emphasis added). In compliance with that rule, Petitioners included such an advisory listing of issues in their petition filed with the Colorado Supreme Court.[4] That advisory

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4. The advisory listing of issues presented in the Petition to the Colorado Supreme Court included:

1. Whether the Colorado Court of Appeals erred by affirming the constitutionality of the Statute:

   a. because the Statute employs the "consent" requirement rejected by the United States Supreme Court in Madsen v. Women's Health Center, 512 U.S. 753, 773-74(1994); and,

   b. because the Statute creates floating speech-free zones rejected by the United States Supreme Court in Schenck v. Pro-Choice Network, 117 S. Ct. 855, 867 (1997)?

2. Whether the Colorado Court of Appeals erred by concluding that the Statute

   a. does not impose or permit content- or viewpoint-based prohibitions of speech?

   b. is not substantially overbroad or unconstitutionally vague?

   c. is not an unconstitutional prior restraint on free speech and press?

   d. is narrowly tailored?

3. Whether the Statute is unconstitutional because it

listing of issues identified every federal question proposed in the pending Petition for a Writ of Certiorari. The court below granted review on its own restated question but specifically denied review on each issue presented in the Petition. *See* Pet. at 8 n.15; Pet. App. at 58a-59a.

Respondents refer to language from the decision below asserting that counsel for Petitioners had conceded that the reasonable time, place and manner test was the appropriate one for analyzing the statute. *See* Opp. at 3; *cf.* Pet. App. at 11a (court's statement that counsel had conceded the point). The problem with the assertion by Respondents is that the court below misstated counsel's argument. *See* Addendum to Reply at 2a. During oral argument, Petitioners' counsel was asked whether the reasonable time, place and manner test was the appropriate one. *Id.* Petitioners' counsel replied that the court below had specifically refused the application for review on Petitioners' claim that the challenged statute embodied content-based decision-making. *Id.*

Clearly, Petitioners preserved below each federal question presented here. The court below simply refused to consider any of those issues in its disposition of the matter.

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a. omits the procedural safeguards required in a system of prior restraints?

b. omits standards to prevent content- or viewpoint-based restrictions on speech?

c. violates the Petitioners' rights to equal protection of the laws?

4. Whether Colorado may subject the exercise of state and federal constitutional rights to the vetoes of private citizens?

See Petition for a Writ of Certiorari at 1-2, *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999).

2.a. Respondents fail to distinguish Colorado's Floating Bubble Zone statute from the relevant holdings in *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 377 (1997), and in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 773 (1994). In *Schenck*, because the "broad speech prohibition 'float[ed,]'" this Court concluded that the restriction was "unsustainable on th[e] record." *Id.* at 377. In *Madsen*, this Court declared, "[t]he 'consent' requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic." 512 U.S. at 774. Here, Petitioners and all Coloradans are subjected to the specific defective restrictions struck by this Court in *Schenck* and in *Madsen*: the Colorado Floating Bubble Zone statute creates speech-free zones that float and that impose a consent-to-speak requirement.

2.b. Respondents erroneously assert that the statute is content-neutral. The statute imposes a requirement of consent to speak, punishes the failure to comply as a misdemeanor, and fails to prohibit content- and viewpoint-based denials of the rights to free speech, free press and peaceable assembly. While the courts below have authoritatively construed the statute, despite its clear terms, to apply to all expression near health care facilities, that construction did not alter the balance of power established by the statute: speakers must have consent from private persons who may withhold consent because of disapproval of content or view.

2.c. Respondents assert that the Colorado Floating Bubble Zone statute is narrowly tailored and so distinguishable from the consent provision struck in *Madsen*. *See* Opp. at 17. The challenged provision is anything but narrowly tailored. It is not limited to the protection of persons entering or leaving health care facilities or their companions. It envelopes *everyone* who passes through the 100-foot zone around the entrance doors to such

facilities. It is not limited in its application to offensive contact or threatening language. It applies to virtually the universe of constitutionally protected expression. Nor is the statute limited in its application to persons responsible for unlawful conduct. Unlike the protesters in *Schenck* and *Madsen*, there is no history of unlawful conduct or abuse by Petitioners or by the many Coloradans now subjected to the statutory rule of silence.

3.a. Respondents contend that the issue of prior restraint is not preserved for review by this Court. Petitioners have demonstrated that they sought review on that issue below. *See* Argument 1.d. and accompanying footnotes, *supra*. The court below specifically refused to consider this issue.

3.b. Respondents contend that the sort of restraint embodied in the challenged statute is not within the scope of this Court's prior restraint doctrine. The purported point of distinction is that the statute designates private parties as censors, whereas this Court's other prior restraint cases have involved the designation of government officers and offices as censors. *See* Opp. 21-22. This purported distinction is insignificant.

Colorado's statute subjects the rights to free speech, free press and peaceable assembly to the requirement of consent. The statute omits standards to guide private decisions on requests for consent. Failure to comply with the statute is a criminal offense. There is no significant point of distinction between the systems of prior restraint previously addressed by this Court and the Colorado Floating Bubble Zone scheme.

4.a. Although Respondents' dispute that there is a conflict between the judgment below and the decision in *Sabelko v. City of Phoenix*, 120 F.3d 161 (9th Cir. 1997), their argument is not well-taken. The Phoenix zones, which at least allowed speech initially, until a person requested that the speaker "back off," were

stricken by the United States Court of Appeals for the Ninth Circuit. The broader zones in Colorado, that operate in advance of expression, were upheld by the court below. Moreover, Respondents simply ignore the other decision of the Ninth Circuit with which the judgment below conflicts, *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1217 (9th Cir. 1998). *See* Petition at 22 n.20.

4.b. Respondents dispute the conflict with the decision of the United States Court of Appeals for the Eighth Circuit. *See* Opp. at 23-24. The Eighth Circuit concluded that a Nebraska statute that prohibited persisting in communicating against the will of another was unconstitutional. *See United Food and Commercial Worker's Int'l Union v. IBP*, 857 F.2d 422, 426 (8th Cir. 1988) (citing statute). Under the statute at issue here, it is a crime to continue to speak to others when they have denied or withheld their consent to speak. Respondents fail to dissipate the conflict created by the judgment below with the decision of the Eighth Circuit.

4.c. Respondents also dispute the conflict with the decision of the North Dakota Supreme Court in *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401 (N.D. 1992). That decision struck down an injunctive ban on "speaking to staff and patients of [the health care facility] who indicate that they do not wish to be spoken to." 488 N.W.2d at 407 n.1. Here, the challenged statute specifically criminalizes communicating with *anyone* who withholds or denies consent for such communications.

5. Respondents accurately conclude that Petitioners suggest that the Colorado Floating Bubble Zone statute should be subjected to more stringent scrutiny than is applied to injunctive restrictions on expression. While the statute does embody a legislative judgment, that judgment imposes a broad, sweeping

ban on all constitutionally significant expression on public sidewalks and streets near every health care facility in Colorado. Everyone within the zones is covered by the statute, whether seeking access to health care facilities or not. All persons who seek to display signs, pass leaflets, or orally educate, counsel or protest are compelled to observe the zones, even though they have never obstructed access to such facilities and do not seek to do so. Such an overbroad provision certainly warrants closer inspection than an injunction imposed in response to pervasive lawlessness.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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ADDENDUM

[The following is an uncertified excerpt from the oral argument before the Colorado Supreme Court. This transcript was prepared from the audio track of an unofficial videotape recording made by public school officials hosting the Colorado Supreme Court's argument session. The Colorado Supreme Court's audiotape recording of the argument was defectively prepared and inaudible.]

MR. HENDERSON: Madam Chief Justice, may it please the Court, by its enactment of CRS 18-9-122, Subsection 3, the State of Colorado has acted to criminalize the exercise of fundamental rights of expression, freedom of speech, and freedom of the press * * * * to criminalize the exercise of fundamental rights of expression in traditional public forum properties, near medical facilities in the state. In doing so the General Assembly has acted in disregard of the First Amendment of the United States Constitution. * * * *

On our initial petition to this Court, this Court denied review. We sought review of the United States Supreme Court, which following its decision in Schenck versus Pro-Choice Network of Western New York, granted our petition, vacated the decision of the Court of Appeals, and remanded the case to the Court of Appeals for further consideration, in light of Schenck.

QUESTION: Mr. Henderson, excuse me for a moment. But there's several significant differences between this case and Schenck. Now, I assume you agree with that.

ANSWER: Yes, Your Honor, there are very significant differences.

QUESTION: And among those differences here, we're dealing with a statute or an ordinance as opposed to an injunctive action problem; isn't that correct?

ANSWER: That is correct, Your Honor. There's no question that there are differences. Those differences, however, do not

result in this statute being able to pass (inaudible) constitutional muster.

QUESTION: Well, those differences, though, don't they determine the standard which should be applied?

ANSWER: Indeed, Your Honor. The Court of Appeals, both initially and on remand, concluded that the statute was content neutral on that.

And because it concluded that the statute was content neutral, it analyzed the statute under the Supreme Court's traditional public forum analysis, concluding that because the statute was narrowly tailored and left open ample alternative channels of communication, that the statute passed Constitutional muster. And it reached that decision both in the first and in the latter review. When the court --

QUESTION: And you agree that was the proper test to use that ordinance?

ANSWER: Your Honor, we did not agree with the Court of Appeals, and sought review, as the Court knows, on the question of content based review. We do not believe the Court correctly got that issue.

QUESTION: Well, that isn't my question. My question was, do you agree that the Ward test is the proper test to be applied to these cases?

ANSWER: Yes. Given the Court (inaudible) decision, yes, Your Honor. That's correct.

* * * *